Supreme Court of the United States

October Term 1945.

No. ———

LANSBURGH & BRO., a Corporation, *Petitioner*,

v.

DORIS E. DEFFEBACH, *Respondent*.

BRIEF IN SUPPORT OF PETITIONER OF CERTIORARI.

1. Was the Action of the Trial Court in Directing a Verdict Correct as a Matter of Law?

This point was covered by the main Assignment of Error in the Court of Appeals. Respondent, as appellant in that Court, vigorously contended that at the end of the plaintiff's case there was sufficient evidence to establish a prima facie case and that the trial court had erred in granting petitioner's motion for a directed verdict. It was conceded in the Court of Appeals that the respondent as plaintiff had rejected recovery on any theory of negligence and had pitched her right to recover solely and entirely, on the statute, supra.

Petitioner recognizes that the rule of caveat emptor may have been modified to some extent by the Uniform Sales Act,

or by the trend of recent decisions, but it asserts that the rule has not been obliterated from the field of American jurisprudence. In this jurisdiction, for a claimant to recover on an implied warranty, the case must be brought within the full scope of the statute. *Hanback* v *Dutch Baker Boy, Inc.*, 70 U. S. App. D. C. 398, 107 F. 2d, 203. If the facts of the case fail to meet the requirements of the statute, then the rule of caveat emptor still obtains. Respondent, at the trial below, specifically advised the Court, through counsel, that she relied upon Section 1 of the Act. An analysis of this section indicates that two things must obtain, viz., (a) the plaintiff either expressly or by implication must have made known to the defendant the particular purpose for which the robe was required, *and* (b) it must appear that the plaintiff relied on the seller's skill or judgment, before an implied warranty of fitness may be relied on. The record discloses that the respondent was familiar with *chenille*. There is no question but that the robe was made of chenille. Respondent, knowing what she wanted, went to a rack on which the robe was displayed with other robes, and without engaging in any conversation with a salesgirl or anybody else in the employ of petitioner, she selected the garment and asked one of the salesgirls in the store to wrap it up. The record discloses that she knew the material from which the robe was made up was loose and fluffy and that she relied upon her own skill and judgment in the selection of the garment. There is nothing in the record to indicate that respondent made known to the store employees either expressly or impliedly any particular purpose for which the robe was to be used. We contend that it is not enough to argue, that, by a mere sale of a chattel *in esse*, an implication arises that it is fit for the purposes for which it was sold. The statute being in the conjunctive imposes the additional requirement that the buyer actually relied upon the skill, judgment or experience of the seller. Both conditions must co-exist.

Mariash on Sales, Section 120, p. 325.

Wasserstrom v.*Cohen*, 165 App. Div. 171, 150 N. Y. S., 638, 540.

Keenan v. *Cherry & Webb*, 47 R. I. 125, 131A, 309 46 Am. Jur. Sec. 348, p. 533.

Bradenberg v. *Samuel Stores*, 211 Iowa 1321, 235 N.W. 741.

Flynn v. *Bedell Co. of Massachusetts*, 242 Mass. 450, 453, 136 N.E. 252.

The foregoing cases, we believe, are authority for the assertion that the respondent failed to make a case under Section 1 of the Statute and therefore the Court was under a duty to direct a verdict for petitioner.

There is no claim in this case that respondent purchased the robe "by description" from petitioner as contemplated by Section 2 of the statute.

Petitioner further contends that respondent made no showing in the trial court that the robe in question was not as the statute says, reasonably fit for the purpose for which it was purchased. Respondent purchased the robe for the sole purpose of using it as a lounging robe. It is admitted that she wore the robe three or four times before the accident complained of. The only way to determine whether it met the purpose of which it was purchased was to wear it. The plaintiff testified she did, and there is no showing on her part that it did not serve that purpose. In fact, were it not for her own negligence in setting herself on fire, as testified to by her own witnesses, it might still be worn and used as a lounging robe. By almost a unanimity of opinion, the Courts throughout the land have laid down a test to be applied to this particular language of the statute.

> "The implied warranty of the statute that goods sold for a known particular purpose 'shall be reasonably fit for such purpose' (Cl. 1, Sec. 15, Chap. 165, R. S.) measures the buyer's right of recovery and the seller's liability. It is accordingly held that in the sale of wearing apparel, if the article could be worn by any normal person without harm and injury is suffered by the pur-

chaser only because of a supersensitive skin, there is no breach of the implied warranty of reasonable fitness of the article for personal wear." *Ross* v. *Porteous, Mitchell & Braun Co.*, 136 Me. 118, 3A 2d 650, 652, citing

Flynn v. *Bedell Co.*, 242 Mass. 450, 136 N.E. 252, 27 A. L. R. 1504; *Bradt* v. *Hollaway*, 242 Mass. 446, 136 N.E. 254.

"If the purchaser makes known the purposes for which he purchases, it will be enough that the merchandise is good for the ordinary purpose of such merchandise. If a special purpose is desired it must be indicated."

Mariash on Sales, Section 119, p. 325.

In nearly all of the decisions the Courts seem to indicate that the implied warranty as to the quality or fitness for any particular purpose means a warrant of "merchantability." The Courts have likewise defined the warrant of merchantability as follows:

"That the coat was fit to wear not for any particular length of time or satisfactorily to the buyer but to wear as an article of apparel. The one way to know whether a coat was so fit to wear was by wearing it." *Bradenberg* v. *Samuel Stores*, 211 Iowa 1321, 235 N.W. 741.

"Fitness for the purpose meant no more than merchantability; it did not mean adaptability for some special use."

Standard Rice Co. v. *P. R. Warren Co.*, 262 Mass. 261, 159 N.E. 508.

"The term 'merchantable' does not require that the article shall be of first quality, but means that the article shall be vendible upon the market in the ordinary course of business and at the average price of such article, having in view the kind of article referred to in the contract." *Goldmark* v. *Simon Bros. Co.*, 110 Nebr. 614, 194 N.W. 686.

"And 'salable or merchantable' does not only mean that it may or should be sold in the market, but it also means, as defined by this court, "that it shall be of ordinary quality, marketable quality, bring the average

price, at least of medium quality or good class, good lawful merchandise of suitable quality, good and sufficient of its kind, free from any remarkable defects.' "
Stevens Tank, etc. Co. v. *Berlin Mills Co.*, 112 Me. 336, 92 A 180.

2. An Interpretation of Title 28, Section 1115 D. C. Code of 1940 (Uniform Sales Act).

As indicated, supra, respondent at the trial stated unequivocally that recovery was predicated on Paragraph 1, Section 1115, Title 28 of the Statute. As we indicated, no reliance was placed upon Paragraph 2 which covers sales "by description." We contended at the trial of the action as well as in the Court of Appeals that Section 1 was modified by Paragraph 3 of Section 28-1115 of the statute. The Trial Court accepted that contention. The record discloses that on direct examination the respondent testified she examined the robe at the time of purchase "for *texture*, color, style and design." The Court of Appeals in its opinion adopted this quotation, entirely ignoring respondent's admission on cross-examination that she knew what chenille was and that she examined it very carefully. She admitted that she knew it was a chenille robe and that it was a soft pile material, fluffy in its texture. Could there be anything clearer within the meaning of the statute to justify our contention that the plaintiff inspected the robe to such an extent that Paragraph 3 of the statute was applicable as the Court applied it below? Mariash on Sales, PP. 329, Section 121. The authorities seem to be uniform, contrary to the opinion of the Court of Appeals, to the effect that if an examination by the purchaser reasonably discloses the nature and composition of the article as it appears to the senses and that there were no latent defects which could not be disclosed or discovered by such an examination, then, there is no implied warranty. There is no evidence in the record to show that the robe contained hidden or latent defects. There is no showing below and no contention was

made in the Court of Appeals that the fabric or finished garment was at any time impregnated with chemicals or compounds such as could not be detected by examination or such as would make the garment harmful to the human body when worn, nor such as would attract fire or cause quick combustion any more than countless other articles made from cotton pile too numerous to mention, and which every woman, if not every man, knows will take fire and burn very rapidly when brought into contact with open flame. Nor was there any showing made to prove or tend to prove that at this time, the textile industry, the chemical industry, fire prevention organizations, or anybody else has been able to process or treat cotton fabrics so as to make them permanently fire proof or fire retardant. The only evidence in the record in support of the plaintiff's case touching on the matter of the likelihood of the robe taking fire when brought into contact with flame was that of the witness Baker, a textile expert, who indicated that he had made a test of a sample of the plaintiff's robe to establish the safety factor of the fabric and testified as a result that it had a very low resistance to flame and only a fraction of a second was required for ignition, that fraction of a second being immeasurable and that from the ignition point the flame flashed across the surface of the fabric spreading the flame rapidly and consuming the sample entirely. But he also testified that he had made similar tests of other chenille which he had acquired on the open market and the comparison test samples, like the sample from the plaintiff's robe, were constructed entirely of cotton of the chenille type; and that each of the samples would burn if brought into contact with flame, the only difference being that the sample taken from the plaintiff's robe would burn much more rapidly than the comparison samples.

The opinion of the Circuit Court indicates an interpretation of Sections 1-3 of the Statute. It assumes, as a matter of law that the respondent could not, by her own examination have ascertained that the material used in the robe

was inflammable and that it would take an expert to establish that fact. We assert that this position is not contemplated by the language of the statute. It is a matter of common knowledge that by and far a large proportion of garments and household furnishings are made from cotton. It is also a matter of common knowledge that any loosely knit cotton, such as was used in the manufacture of the robe, will take fire if brought into contact with flame; some, depending on the nature of their unfinished surface will burn more rapidly than others but if the purchaser examines carefully, as this respondent admitted she did, then, unless there are hidden defects which such an inspection would not reasonably disclose, Section 3 of the Statute must be applied, and claimant denied recovery or at least it would still be a question of fact for a jury to pass upon. This the Court in its opinion seems to reject and holds in effect that where an expert would testify that material from which the garment was made will take fire instantly and burn rapidly then, as a matter of law there is breach of the implied warranty. This we contend will make the manufacturer or vendor an insurer. Such is not the purpose of the statute.

3. The Opinion of the United States Court of Appeals for the District of Columbia Deprives Petitioner of the Right to Have Important Issues of Fact Settled by a Jury Upon a Re-trial.

As we have indicated, the appeal from the trial court was predicated upon the theory that the court was in error in directing a verdict for petitioner, and was in error as to its rulings on the admissibility or rejection of evidence. In its opinion, the Court, contrary to the almost universal weight of authority, reversed the judgment of the Trial Court. It reversed the action of the Court in granting the motion for directed verdict at the end of plaintiff's case, and in no respect passed upon the questions as to the admissibility or rejection of the evidence. Although the matter of instructions to the jury was not, and could not properly have been

presented on the appeal and was not briefed or argued, the Court of Appeals in its opinion concludes with this language.

> "Accordingly, we think the jury should have been instructed that if the robe caught fire and burned as the witnesses testified, there was a breach of appellee's implied warranty of fitness."

Since the case would have to be re-tried under the judgment of the Court of Appeals, it seems to us that this language of the opinion will deprive petitioner of its right to have a jury pass on this issue as a question of fact, thereby depriving it in part of its Constitutional right of a trial by jury. It precludes the right of the petitioner to have the jury pass on such facts as the respondent's knowledge of the texture of the garment, its evident tendency to catch fire and burn rapidly if negligently brought into contact with fire, the fact that this garment is no different in texture, composition, etc., than other cotton garments made of loose open-end cotton, so many of which have been on sale and are still on sale every day in every wearing-apparel store in the country and many other questions which must necessarily create issues of fact and which only the jury, by their verdict, could settle. The Court's opinion definitely rules as a matter of law that respondent is entitled to recover upon no other basis than the flammability of the robe, leaving the jury to settle no other issues of fact except the amount of the verdict. The court does not cite a single case in its opinion as authority for the position it takes and as we have said before, the opinion is seemingly in the very teeth of the universal weight of opinion construing the Uniform Sales Act. See cases supra.

4. The Opinion of the United States Circuit Court of Appeals in Interpreting the Statute, Supra, is in Conflict with Almost the Uniform Weight of Authority.

The cases herein cited deal with interpretation of the Uniform Sales Act (supra) in other jurisdictions throughout the country. A reading of these cases, we believe, will convince the Court that the opinion of the Court of Appeals is in direct conflict therewith. We repeat, that the Court of Appeals in its opinion failed to cite any case as authority for the position it took in its opinion. The opinion of the Court of Appeals in effect makes petitioner, as well as every other merchant engaged in the business of selling cotton fabrics, an insurer that it would be fire-proof. When manufacturers undertook to create and market cotton garments treated with chemicals, compounds of other substances known to be dangerous whether from the results of fire or from ordinary contact with the human body, the law recognizes to some extent the application of an implied warranty, but we are unable to find any decision which would seem to indicate the imposition of an implied warranty on the manufacturer or vendor of cotton fabrics as to which, because of the very nature of cotton itself, combustion occurs when brought into contact with open flame. That is what the opinion of the Court of Appeals seems to hold and to that extent it is in conflict with the great weight of authority. Cases cited, supra. For that reason we earnestly believe that it requires an expression from this Court since it will require an interpretation of the Uniform Sales Act in force and effect in Thirty-four of the States.

5. The Petition for Re-hearing Should Have Been Granted by the Full Bench of the Circuit Court.

A petition for re-hearing or for modification of the opinion was filed within the time permitted by the rules of the Court of Appeals together with a motion for leave to file a petition to have the same heard by the remaining members of

the Bench of that Court. It was pointed out that Mr. Justice Arnold had resigned and was no longer eligible to pass on the matter; and that Mr. Justice Miller had resigned, which resignation was to be effective October 1, 1945, he being then out of the jurisdiction and not available to pass upon the merits of the motion. The orders of the Court overruling both the petition and motion are before this Court. We believe that petitioner was entitled to have its petition for re-hearing passed upon as provided for by the rules of the Circuit Court and since that was not possible as we viewed it, that the full Bench should re-hear the case *de novo*.

CONCLUSION.

We earnestly contend that the position presents a matter of such importance to the public, as well as to the cotton-garment industry, as to call for an expression from this Court interpreting the Uniform Sales Act under the facts and circumstances disclosed by the record herein.

Respectfully submitted,

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